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Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–62 OF 2003
ABDUL AZIZ MOHAMAD, JAMES FOONG AND MOHD NOOR ABDULLAH JJCA
16 JUNE 2006

C *Banking — Banker and customer — Joint account — Whether survivorship clause confers the survivor beneficial ownership of the money in a joint account — Whether appellant was relying on the survivorship mandate per se to claim property in the moneys in the joint accounts*

D *Islamic Law — Jurisdiction — High Court or Syariah Court — Money in joint accounts — Whether there had been a gift or hibah of the moneys in the joint accounts — Whether the matter is to be approached from a civil law perspective or whether Syariah principles apply*

E *Islamic Law — Gifts — Constituent elements to constitute hibah — Whether gift was complete*

F Dato' Sharibun bin Wahab ('the deceased'), leaving various properties, movable and immovable, as his assets. In his lifetime the deceased had married three women. The first was Pn Ramlah bte Haji Umar, who bore him a daughter, Zation, and whom he divorced in 1953. In 1956, he married Pn Buruk bte Abdullah ('Pn Buruk'), who bore him five daughters, Rosmawati, Roslinawati, Rosilawati, Roshayati and Rosnita. In 1981, while married to Pn Buruk, he married Pn Latifah
G bte Mat Zin, the appellant, who bore him a daughter, Noor Hafisah, and a son, Muhammad Hidayat. Pn Buruk died on 17 March 1998. The beneficiaries of the deceased's estate were therefore the appellant, being his surviving spouse, and his eight children, one by Pn Ramlah, five by Pn Buruk and two by the appellant. During Pn Buruk's lifetime, the deceased maintained several accounts of various types
H jointly with her at the Standard Chartered Bank ('the SCB joint accounts'). Shortly after Pn Buruk's death, the deceased opened a joint current account with the appellant at the Bumiputra Commerce Bank ('the BCB joint account'). Collectively, the SCB joint accounts and the BCB joint account shall be referred to as 'the joint accounts'. Under the terms and conditions of the joint accounts, the deceased and the
I appellant agreed that in the event of the death of either, 'any balance remaining in the credit of our Joint Account may be paid to the survivor' ('the survivorship clause'). Rosmawati, Pn Buruk's daughter, filed a petition for letters of administration to the deceased's estate, in which she included the joint accounts among the assets of the estate of the deceased, and did not include the appellant and her two children among the beneficiaries of the estate. The appellant entered a caveat in the deceased's estate.

Following the entry of the appellant's caveat, the dispute that ultimately had to be decided by the High Court on the respondents' petition was a dispute over the moneys in the joint accounts, with the appellant claiming them as hers, having been gifted to her by the deceased, and the respondents claiming that they belonged to the deceased's estate. The deceased also had a Higher Education Fund ('HEF') account at the Standard Chartered Bank's Higher Education Fund programme. There was, among the exhibits, a form of Higher Education Fund standing instruction, which was in the bank's standard form, filled in respect of the deceased in which the appellant is mentioned as the beneficiary. The form, however, was not signed by the deceased or anyone else. The appellant claimed the money in the HEF account on the basis that she was named as the beneficiary. The learned trial judge ruled that Islamic law applied for the resolution of the dispute and found that there had been no gift or hibah of the moneys in the joint accounts. As to the money in the HEF account, the learned judge found that the hibah was not complete because the deceased did not sign the standing instruction form. The main issue in this appeal was whether the matter is to be approached from a civil law perspective or whether Syariah principles apply.

Held, dismissing the appeal:

(1) The banking law on the right of survivorship in a joint account which in actual fact does not exist in written form as Federal law and which is really a matter of contract purely does not go so far as to confer on the survivor beneficial ownership of the money in a joint account. The survivorship clause or the right of survivorship merely entitles the survivor to receive the money and enables the bank to pay the money to the survivor and thereby obtain a good discharge, but whether the survivor is beneficially entitled to the money was another question entirely that was not the concern of the bank or banking law. The survivorship clause alone did not confer beneficial ownership. The appellant was not relying on the survivorship mandate per se to claim property in the moneys in the joint accounts. She was relying on the law of gifts, claiming that the moneys had been gifted to her and resorting to various circumstances, including the fact of the creation of the joint accounts and the fact of the survivorship mandate, to contend that there had been a gift. Therefore the true applicable law for this case was the law of gifts (see paras 18–19).

(2) The court does not accept the proposition that Islamic law has no force or operation in this country unless it is contained in written law. The Syariah courts have jurisdiction in respect of a variety of civil matters that are specified in Item 1 of the State List of the Federal Consitution. Not all of those matters have been codified in legislation. Even when there is legislation in respect of a matter, there are bound to be various aspects of the matter that are not covered by legislation. To require that Islamic law on a particular matter or point must be contained in a statute before it can be given effect to would hamper the Syariah courts in their ability to decide a dispute where it involves a matter or point of Islamic law that is not covered by legislation. The civil courts would

similarly be hampered where a dispute that falls within their jurisdiction necessitates the determination of a point of Islamic law that is not covered by legislation (see para 21).

(3) The matter of succession and the matter of gifts according to Islamic law, where they involve Muslims, are matters within the judicial jurisdiction of the Syariah courts. A dispute about gifts is not a dispute about probate and administration, just because it arises in the context of the administration of an estate. In the course of administering an estate, various problems may arise, such as, as in this case, whether a property belongs to the estate, the answer to which depends, as in this case, on whether the property belongs to someone else as a valid gift, or whether a person is a beneficiary, the answer to which may depend on whether he is the issue of a valid marriage. Each of these problems has to be solved according to the particular law that is applicable to the nature of the problem. It may be the law of gifts, or the law of marriage, or even the land law. Merely by reason that the problem arises in the course or context of administering an estate, it does not become a problem of the law of probate and administration (see paras 23, 26).

(4) The subject matter of the dispute in this case, which was that of gifts inter vivos or hibah between Muslims, was not a probate and administration matter and was within the jurisdiction of the Syariah courts. Consistently with Item 1 of the State List of the Federal Constitution, the Administration of Islamic Law (Selangor) Enactment 1989, in s 42(2)(b)(vi), the Administration of Islamic Law (Selangor) Enactment 2003, in s 61(3)(b)(vi), and the Administration of Islamic Law (Federal Territories) Act 1993, in s 46(2)(b)(vi), all include the matters of gifts inter vivos involving Muslims within the jurisdiction of the Syariah High Court (see para 27).

(5) Having found that the dispute in this case concerned a matter that was within the jurisdiction of the Syariah courts, the civil High Courts shall have no jurisdiction in respect of the matter. If a matter is within the jurisdiction of the Syariah courts, the Constitution denies jurisdiction in respect of it to the civil High Courts and, in face of such express denial, jurisdiction cannot be conferred by the agreement or consent of the parties. The consequence is that the civil High Court had no jurisdiction over the dispute and the orders made were null and void and have to be set aside. Therefore, and considering that it did not result in an outcome favourable to the appellant, the court dismissed the appeal and set aside the orders of the High Court. The court must uphold art 121 cl (1A) of the Federal Constitution as a matter of great constitutional importance (see para 28).

(6) To provide against the eventuality that it be decided on appeal that the court was wrong in holding that the civil High Court had no jurisdiction to hear and decide this dispute and in deciding on that ground that this appeal be dismissed, the court proceeded to consider the appeal on its merits. The conditions for the validity of a hibah, were, namely, (1) a manifestation of the wish of the donor, (2) the acceptance of the donee, either impliedly or expressly, and (3) the taking possession of the subject-matter of the gift by the donee, either actually or constructively. On the facts of the case, the respondents' failed in their contention that there was no proof of the required

intention on the part of the deceased as regards to the joint accounts. Since the absence of intention was the respondents' only contention in the appeal as regards the joint accounts, the hibah had been proved in respect of the joint accounts and that therefore the moneys in the joint accounts were the property of the appellant (see paras 29,.31, 62)

(7) As regards the money in the HEF account, since there was clear evidence of the Standard Chartered Bank officer that the deceased insisted that the appellant be the beneficiary and since the account was in fact opened, it did not matter that the form was not signed. The money in the HEF account was also the property of the appellant (see para 63).

[Bahasa Malaysia summary

Dato' Sharibun bin Wahab ('si mati'), meninggalkan beberapa harta, yang boleh alih dan tidak boleh alih, sebagai aset-asetnya. Semasa hayatnya si mati telah berkahwin dengan tiga wanita. Pertama, Pn Ramlah bte Haji Umar, yang telah mengandungkannya seorang anak perempuan, dan yang beliau telah ceraikan pada 1953. Pada 1956, beliau telah berkahwin dengan Pn Buruk bte Abdullah ('Pn Buruk'), yang telah mengandungkannya lima anak perempuan, Rosmawati, Roslinawati, Rosilawati, Roshayati dan Rosnita. Pada 1981, semasa berkahwin dengan Pn Buruk, beliau telah berkahwin dengan Pn Latifah bte Mat Zin, perayu, yang mengandungkannya seorang anak perempuan, Noor Hafisah, dan seorang anak lelaki, Muhammad Hidayat. Pn Buruk telah meninggal dunia pada 17 Mac 1998. Benefisiari-benefisiari untuk harta pusaka si mati adalah perayu, yang merupakan pasangannya yang masih hidup, dan lapan orang anaknya, seorang anak daripada Pn Ramlah, lima anak daripada Pn Buruk dan dua anak daripada perayu. Semasa hayat Pn Buruk, si mati telah membuka beberapa jenis akaun bersama dengannya di Standard Chartered Bank ('akaun-akaun bersama SCB'). Sejurus selepas kematian Pn Buruk, si mati telah membuka akaun semasa bersama dengan perayu di Bumiputra Commerce Bank ('akaun bersama BCBt'). Secara kolektif, akaun-akaun bersama SCB dan akaun bersama BCB hendaklah dirujuk sebagai 'akaun-akaun bersama'. Di bawah terma-terma dan syarat-syarat akaun-akaun bersama itu, si mati dan perayu bersetuju jika salah seorang daripada mereka meninggal dunia, 'any balance remaining in the credit of our Joint Account may be paid to the survivor' ('klausa kemandirian'). Rosmawati, anak perempuan Pn Buruk, telah memfailkan satu petisyen untuk surat-surat pentadbiran kepada harta pusaka si mati, yang mana beliau memasukkan akaun-akaun bersama itu sebagai antara aset-aset si mati, dan tidak memasukkan perayu dan dua orang anaknya sebagai benefisiari harta pusaka itu. Perayu telah memasuki satu kaveat dalam harta pusaka si mati. Berikutan kemasukan kaveat perayu, pertikaian yang perlu diputuskan oleh Mahkamah Tinggi berhubung petisyen responden-responden adalah satu pertikaian tentang wang dalam akaun-akaun bersama itu, yang mana perayu menuntut terhadap mereka sebagai miliknya, yang telah dihadiahkan kepadanya oleh si mati, dan responden-responden menuntut yang ia milik harta pusaka si mati. Si mati juga mempunyai akaun Dana Pengajian Tinggi ('HEF') dalam program Dana Pengajian Tinggi Standard Chartered Bank. Di antara ekshibit-ekshibit itu terdapat satu borang arahan Dana Pengajian Tinggi, yang dalam borang standard bank, yang telah dipenuhi tentang si mati yang mana perayu disebutkan sebagai benefisiari.

A Borang itu, bagaimanapun, tidak ditandatangani oleh si mati atau sesiapa yang lain. Perayu menuntut wang dalam akaun HEF itu berdasarkan namanya sebagai benefisiari. Hakim perbicaraan yang bijaksana memutuskan bahawa undang-undang Islam terpakai untuk menyelesaikan pertikaian tersebut dan mendapati tiada hadiah atau hibah wang dalam akaun-akaun bersama itu. Berhubung wang dalam akaun
B HEF itu, hakim yang bijaksana mendapati bahawa hibah tidak lengkap kerana si mati tidak menandatangani borang arahan utama itu. Persoalan dalam rayuan ini adalah sama ada perkara tersebut boleh dikendalikan daripada perspektif undang-undang sivil atau sama ada prinsip-prinsip Syariah terpakai.

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Diputuskan, menolak rayuan tersebut:

(1) Undang-undang perbankan tenang hak kemandirian dalam akaun bersama pada hakikatnya tidak wujud dalam bentuk bertulis sebagai undang-undang Persekutuan dan sememangnya satu perkara berkaitan kontrak yang tidak
D memberikan milikan kemandirian benefisiari itu wang dalam satu akaun bersama. Klausa kemandirian atau hak kemandirian hanya memberikan hak kepada yang masih hidup itu untuk menerima wang itu dan membolehkan bank membayar wang itu kepada orang yang masih hidup itu dan oleh itu mendapat pelaksanaan yang baik, tetapi sama ada orang yang masih hidup itu berhak secara benefisial terhadap wang itu adalah persoalan lain sama sekali
E yang bukan dalam skop bank atau undang-undang perbankan. Klausa kemandirian sahaja tidak memberikan milikan benefisial. Perayu tidak bergantung kepada mandat kemandirian per se untuk menuntut harta dalam wang akaun bersama itu. Beliau bergantung kepada undang-undang hadiah, menuntut bahawa wang tersebut merupakan hadiah kepadanya dan mencuba
F pelbagai jalan, termasuklah fakta yang pembentukan akaun-akaun bersama dan fakta kemandirian itu dibuat, untuk menegaskan bahawa terdapat hadiah. Oleh itu pemakaian sebenar undang-undang untuk kes ini adalah undang-undang hadiah (lihat perenggan 18–19).

(2) Mahkamah tidak menerima saranan bahawa undang-undang Islam tidak
G berkuasa atau beroperasi dalam negara ini kecuali ia terkandung dalam undang-undang bertulis. Mahkamah-mahkamah Syariah mempunyai bidang kuasa berkaitan pelbagai perkara sivil yang dinyatakan dalam Item 1 kepada Senarai Negeri Perlembagaan Persekutuan. Tidak kesemua perkara tersebut telah dikodifikasikan dalam perundangan. Jikapun terdapat perundangan berkaitan suatu perkara, pasti terdapat pelbagai aspek perkara itu yang tidak
H diliputi oleh perundangan itu. Untuk menghendaki undang-undang Islam berhubung perkara tertentu itu terkandung dalam suatu statut sebelum ia boleh memberi kesan yang mana Mahkamah Syariah tidak berupaya untuk memutuskan satu pertikaian yang melibatkan perkara berkaitan undang-undang Islam yang tidak diliputi oleh perundangan.
I Mahkamah-mahkamah sivil juga terhalang jika satu pertikaian yang terangkum dalam bidang kuasanya memerlukan keputusan dari segi undang-undang Islam yang tidak diliputi oleh perundangan (lihat perenggan 21).

(3) Perkara tentang pewarisan dan perkara tentang hadiah menurut undang-undang Islam, yang melibatkan orang beragama Islam, adalah perkara dalam bidang kuasa kehakiman mahkamah-mahkamah Syariah. Satu pertikaian berhubung hadiah bukan satu pertikaian tentang probet dan pentadbiran, hanya disebabkan ia timbul dalam konteks pentadbiran suatu harta pusaka. Dalam proses pentadbiran suatu harta pusaka, pelbagai masalah akan timbul, seperti dalam kes ini, sama ada harta tersebut milik harta pusaka, jawapannya bergantung, seperti dalam kes ini, kepada sama ada harta itu milik orang lain sebagai hadiah yang sah, atau sama ada seseorang itu merupakan benefisiari, jawapan yang mungkin perlu bergantung kepada sama ada beliau adalah isu satu perkahwinan yang sah. Setiap masalah perlu diselesaikan menurut undang-undang tertentu yang terpakai mengikut sifat masalah itu. Ia mungkin undang-undang hadiah, atau undang-undang perkahwinan, ataupun undang-undang tanah. Hanya dengan memerikan alasan bahawa masalah itu timbul semasa atau dalam konteks pentadbiran suatu harta pusaka, ia tidak menjadi satu masalah undang-undang probet dan pentadbiran (lihat perenggan 23, 26).

(4) Perkara pokok pertikaian dalam kes ini, yang mana adalah berkaitan hadiah inter vivos atau hibah antara orang Muslim, bukan perkara probet dan pentadbiran dan adalah dalam bidang kuasa mahkamah Syariah. Konsisten dengan Item 1 Senarai Negeri Perlembagaan Persekutuan, Enakmen Pentadbiran Undang-Undang Islam (Selangor) 1989, dalam s 42(2)(b)(vi), Enakmen Pentadbiran Undang-Undang Islam (Selangor) 2003, dalam s 61(3)(b)(vi), dan Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993, dalam s 46(2)(b)(vi), semuanya termasuklah perkara berhubung hadiah inter vivos yang melibatkan orang beragama Islam dalam bidnag kuasa Mahkamah Tinggi Syariah (lihat perenggan 27).

(5) Memandangkan pertikaian dalam kes ini adalah berkaitan perkara yang dalam bidang kuasa mahkamah Syariah, Mahkamah Tinggi sivil tidak mempunyai bidang kuasa berkaitan perkara ini. Jika suatu perkara itu dalam bidang kuasa mahkamah Syariah, Perlembagaan menafikan bidang kuasa dalam Mahkamah Tinggi sivil dan, dengan penafian nyata ini, bidang kuasa itu tidak boleh diberikan dengan persetujuan pihak-pihak. Akibatnya adalah Mahkamah Tinggi sivil tidak mempunyai bidang kuasa ke atas pertikaian itu dan perintah yang dibuat adalah terbatal dan tidak sah dan perlu diketepikan. Oleh itu, dan dengan mempertimbangkan keputusan tidak berpihak kepada perayu, mahkamah menolak rayuan itu dan mengetepikan perintah-perintah Mahkamah Tinggi. Mahkamah perlu mengesahkan perkara 121 kl (1A) Perlembagaan Persekutuan sebagai perkara penting berperlembagaan (lihat perenggan 28).

(6) Dengan kemungkinan bahawa ia diputuskan dalam rayuan bahawa mahkamah silap dalam memutuskan bahawa Mahkamah Tinggi sivil tiada bidang kuasa untuk mendengar dan memutuskan pertikaian ini dan dalam memutuskan atas alasan bahawa rayuan ini ditolak, mahkamah terus mempertimbangkan rayuan atas meritnya. Syarat-syarat untuk kesahan hibah, adalah: (1) penyataan jelas niat penderma, (2) penerima derma, adalah secara tersirat atau nyata, dan

(3) mengambil milikan perkara pokok hadiah oleh penerima derma, sama ada secara nyata atau konstruktif. Berdasarkan fakta kes, responden-responden telah gagal dalam penegasan mereka bahawa tiada bukti tentang niat yang dikehendaki di pihak si mati berkaitan akaun-akaun bersama itu. Memandangkan ketiadaan niat itu adalah satu-satunya hujah dalam rayuan ini berkaitan akaun-akaun bersama itu, hibah telahpun dibuktikan berkaitan akaun-akaun bersama itu dan oleh demikian wang dalam akaun-akaun bersama itu adalah harta perayu (lihat perenggan 29, 31, 62).

(7) Berhubung wang dalam akaun HEF, memandangkan terdapat keterangan jelas pegawai Standard Chartered Bank yang si mati dengan tegas inginkan perayu sebagai benefisiari dan memandangkan akaun itu dibuka, ia tidak kira yang borang itu tidak ditandatangani. Wang dalam akaun HEF itu juga harta perayu (lihat perenggan 63).]

Notes

For a case on joint account, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1855.
For cases on gifts under Islamic law, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 483–489.
For cases on jurisdiction of High Court or Syariah Court, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 500–504, 517–539.

Cases referred to

Jumaaton dan satu lagi lwn Raja Hizaruddin [1998] 6 MLJ 556 (refd)
Tengku Haji Jaafar Ibni Almarhum Tengku Muda Ali & Anor v Government of Pahang [1987] 2 MLJ 74 (refd)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993 s 46(2)(b)(vi)
Administration of Islamic Law (Selangor) Enactment 1989 s 42(2)(b)(vi)
Administration of Islamic Law (Selangor) Enactment 2003 s 61(3)(b)(vi)
Banking and Financial Institutions Act 1989
Contracts Act 1950
Courts of Judicature Act 1964 s 42
Federal Constitution arts 74, 75, 121
Probate and Administration Act 1959

Appeal from: Civil Suit No S8(2)–31–92 of 2000 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (HL Ang with him) (Malik Imtiaz Sarwar) for the appellant.
Pawancheek Marican (Suzilawati Ismail and Saiful Izham Ramli with him) (Wan Marizan Hamzah & Shaik) for the respondents.

Abdul Aziz Mohamad JCA:

[1] Dato' Sharibun bin Wahab ('the deceased') died on 2 January 2000, leaving various properties, movable and immovable, as his assets. In his lifetime, the deceased had married three women. The first was Pn Ramlah bte Haji Umar, who bore him

a daughter, Zation, and whom he divorced in 1953. In 1956, he married Pn Buruk bte Abdullah, who bore him five daughters, Rosmawati, Roslinawati, Rosilawati, Roshayati and Rosnita. In 1981, while married to Pn Buruk, he married Pn Latifah bte Mat Zin, the appellant, who bore him a daughter, Noor Hafisah, and a son, Muhammad Hidayat, who was born on 21 March 1985 and was therefore a minor when the deceased died. Pn Buruk died on 17 March 1998. The beneficiaries of the deceased's estate are therefore the appellant, being his surviving spouse, and his eight children, one by Pn Ramlah, five by Pn Buruk and two by the appellant.

[2] During Pn Buruk's lifetime, the deceased maintained several accounts of various types jointly with her at the Standard Chartered Bank, Jalan Ampang, Kuala Lumpur ('the SCB'). Shortly after Pn Buruk's death, the deceased, on 29 March 1998, opened a joint current account with the appellant at the Bumiputra Commerce Bank's branch in Taman Sri Serdang, Sri Kembangan, Selangor ('the BCB'). We shall refer to this as 'the BCB joint account'. And on 9 April 1998, he converted the joint accounts with Pn Buruk at the Standard Chartered Bank to joint accounts with the appellant. We shall refer to these joint accounts as 'the SCB joint accounts'. We shall refer to the BCB joint account and the SCB joint accounts together as 'the joint accounts'.

[3] For the opening of the BCB joint account, the deceased and the appellant signed a set of terms and conditions which constituted an agreement between them and the bank. By para 11.5 of the terms and conditions the deceased and the appellant agreed that in the event of the death of either, 'any balance remaining in the credit of our Joint Account may be paid to the survivor'. For the conversion of the SCB joint accounts, the deceased signed, and the appellant also signed as concurring with, a letter of request to the bank, in the bank's standard form, containing certain terms. By para 5 of the terms, the deceased and the appellant authorized the bank, inter alia, 'To hold on the death of either … of us any credit balance(s) in our joint names … to the order of the survivor … '. We shall refer to those provisions of para 11.5 and para 5 as 'the survivorship mandate'. By the terms of both documents the banks were authorized to make payments from the accounts on the instructions of either the deceased or the appellant although the sums that went into the accounts from time to time all came from the deceased.

[4] After the death of the deceased on 2 January 2000, the appellant made four withdrawals in the same month of January from the BCB joint account, totalling RM928,800, leaving a balance of RM122.33. On 29 February 2000, the SCB joint accounts stood at a total of RM2,782,136.60.

[5] On 8 March 2000, Rosmawati, Pn Buruk's daughter, filed a petition for letters of administration to the deceased's estate, in which she included the joint accounts among the assets of the estate of the deceased, and did not include the appellant and her two children among the beneficiaries of the estate.

[6] On 5 April 2000, the appellant entered a caveat in the deceased's estate.

A **[7]** On 28 February 2001, on the application of Rosmawati the petitioner, it was ordered that Roslinawati, another daughter of Pn Buruk's, be made a joint petitioner and that the appellant and her two children be included in the list of the beneficiaries. Rosmawati and Roslinawati thus became joint petitioners. They are the respondents in this appeal.

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[8] Following the entry of the appellant's caveat, the dispute that ultimately had to be decided by the High Court on the respondents' petition was a dispute over the moneys in the joint accounts, with the appellant claiming them as hers, having been gifted to her by the deceased, and the respondents claiming that they belonged to the deceased's estate. As regards the administration of the estate and the rest of the assets, we are informed by the respondents' counsel that a consent judgment had been entered whereby the solicitors for both sides were appointed administrators and the rest of the assets were to be distributed among all the beneficiaries according to *faraid*. We have not been able to find in the appeal records any indication as to the stage of the proceedings at which the consent judgment was made.

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[9] The learned judge ordered that the dispute over the joint accounts be tried and that for that purpose the petition be converted to a writ. It was agreed between the parties that the principal issue to be tried was 'whether the monies in the joint accounts … are the property of the caveator, such monies having been the subject of gifts inter vivos recognisable in Islamic law as 'hibah' by the deceased to the caveator'.

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[10] Two observations may be made about the way in which the issue is worded. First, the words 'having been the subject of gifts inter vivos' would mean that the parties had agreed that the moneys were a gift inter vivos. Obviously that is not so, because if it were so there would have been no issue to be tried. The words were in fact intended to constitute the question to be answered. Secondly, it would appear that the parties agreed that the issue was whether, according to Islamic law, the moneys had been the subject of *hibah* and that therefore Islamic law was to apply in deciding the issue. That is not so, because in the High Court and in this appeal the appellant's counsel contended that the Islamic law principles are not applicable in deciding the dispute.

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[11] There is another matter to be mentioned about the issue as framed. It is confined to the joint accounts. But the deceased also had a Higher Education Fund ('HEF') account at the SCB on Jalan Ampang under the bank's Higher Education Fund programme, under which customers could save money by paying a certain fixed amount monthly for the education of their children. There is, among the exhibits, a form of Higher Education Fund standing instruction, which is in the bank's standard form, filled in in respect of the deceased and dated 16 October 1998, in which the appellant is mentioned as the beneficiary. The form describes the HEF account as a trust account and para 7 of the declaration in the form, which is a declaration by an applicant, acknowledges 'that Syariah law will supersede the Trust in the case of Muslim account holders'. The form, however, is not signed by the deceased or anyone else. According to the bank's officer, the deceased insisted that the appellant be the beneficiary and paid a lump sum of RM93,000 into his HEF account from his personal savings account's dividends. The appellant, in one of her

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affidavits, stated that as at 5 January 2000 the account stood at RM99,600.68. The HEF account is not a joint account and therefore is not included in the terms of the issue as framed, but it nevertheless came into the dispute, the appellant claiming the money in the account on the basis that she was named as the beneficiary.

[12] The learned trial judge ruled that Islamic law applied for the resolution of the dispute. He found that there had been no gift or *hibah* of the moneys in the joint accounts because, as there was evidence that both the deceased and the appellant were free to use them and that payments made from them were for their interests, the appellant did not have exclusive possession of the moneys in them. Another reason was that in his personal affairs and the affairs of his family, it was the deceased himself who made the final decision, which we must say is a reason that we are unable to comprehend. As to the money in the HEF account, the learned judge found that the *hibah* was not complete because the deceased did not sign the standing instruction form.

[13] The judge ordered that there be paid to the administrators, for them to distribute among the beneficiaries according to *faraid*, the sum of RM928,800 that the appellant had withdrawn from the BCB joint account, with interest, and all sums remaining in the BCB joint account and the SCB joint accounts. Actually the wording in respect of SCB is 'semua wang yang ada dalam nama Sharibun bin Wahab and Latifah bt Mat Zin'. It may have been intended by such wording, which does not mention joint accounts, that the order would cover the SCB joint accounts as well as the HEF account.

[14] In para 6 of the outline of submission of the appellant, which we shall refer to as 'the appellant's outline submission', the appellant's counsel, after stating the main issue in the appeal as, in effect, what has been agreed, that is 'whether the monies in the joint accounts … are the property of the [appellant]', says, with the emphasis of underscoring: 'This is the nub of the appeal ie whether the matter is to be approached [from] a civil law perspective or whether syariah principles apply'. Thus put, it is a question of the applicable law, whether civil law or Islamic law.

[15] He begins his argument on the applicable law by saying in para 13 that 'The matter in hand is a matter of banking and contract law (when one considers the mandate)'. It is to be noted that the assertion is qualified by, or is subject to, the words 'when one considers the mandate'. By 'mandate', we understand him to mean the survivorship mandate. He specifies the applicable laws as the Probate and Administration Act 1959, the Banking and Financial Institutions Act 1989 and the Contracts Act 1950, which are Federal laws made by Parliament. In para 14.4, after stating that matters of Islamic law fall within the State legislative jurisdiction, he argues, in subparagraph a, that 'Specific laws must however be made … For there to be an operational and applicable law, the specific enactment must be made'. As to what specific law he has in mind that must be made, this is specified in the last sentence of subparagraph a, as amended orally in open court: 'There is at this time no such applicable law as to joint accounts'. And in subparagraph c he concludes that even if the State legislature were to enact the Islamic law on joint accounts, including the right of survivorship in joint accounts, and the law were to have an effect that is

different or contrary to the Federal law that governs joint accounts and the right of survivorship, by virtue of Federal Constitution art 75 of the Federal Constitution the Federal law must prevail 'in that the bank is bound to comply with the mandates given to it by its customers'. Here again prominence is given to 'mandates', which we take to mean survivorship mandates.

[16] We must admit that in thus setting out the gist of the argument of the appellant's counsel in his written submission, we have, except where we have quoted his actual words, added or used words of our own, but that is not in order to twist or misrepresent what is said but so as to better express, or to paraphrase, or to make clearer, what we believe he means to say.

[17] The argument, to the extent that we have set it out is, be it noted, about the law on joint accounts and the right of survivorship in joint accounts. Let us try to put the argument in a nutshell. The law on joint accounts and the right of survivorship therein is Federal law. Islamic law on joint accounts and the right of survivorship cannot be made to apply directly in this country. It must be legislated for by the State legislature — which has not been done — and then only can it be applied, as State law. But even then it cannot change the effect of the Federal law because the Federal law will always prevail. Therefore the Federal law of banking and contracts has to be the applicable law.

[18] We think that the setting up of banking and contract laws against the respondents is misconceived and irrelevant. The question 'Whether the monies in the joint accounts … are the property of the [appellant]' is really a question whether the appellant is beneficially entitled to the amounts standing in the joint accounts at the death of the deceased. The appellant claims 'property' in the moneys as her own. She claims ownership of the moneys, that is, that she is beneficially entitled to them. But the banking law on the right of survivorship in a joint account — which in actual fact does not exist in written form as Federal law and which is really a matter of contract purely — does not go so far as to confer on the survivor beneficial ownership of the money in a joint account. This is clear from the following passage from *The Law and Practice of Banking* by J Milnes Holden, Vol 1 (4th Ed) at p 387:

> 11-86 In the vast majority of cases a bank will obtain a good discharge by paying the balance of a joint account to the survivor or survivors, either because of the express terms of a survivorship clause or because of the right of survivorship which arises when money is deposited in joint names. It does not follow, however, that the survivor or survivors are beneficially entitled to the money standing to the credit of the account. Sometimes, the survivor or survivors will hold the balance in trust for the personal representatives of the party who died first; sometimes the survivor or survivors will be beneficially entitled to the whole of the balance; and in other cases, the balance may have to be apportioned. Fortunately, the bank is not usually concerned with these problems which, in default of agreement, may have to be resolved by the courts.

The survivorship clause or the right of survivorship merely entitles the survivor to receive the money and enables the bank to pay the money to the survivor and thereby obtain a good discharge, but whether the survivor is beneficially entitled to the money is another question entirely that is not the concern of the bank or banking law. The survivorship clause alone does not confer beneficial ownership. As a matter

of fact, the appellant in this case is not relying on the survivorship mandate *per se* to claim property in the moneys in the joint accounts. She is relying on the law of gifts, claiming that the moneys had been gifted to her and resorting to various circumstances, including the fact of the creation of the joint accounts and the fact of the survivorship mandate, to contend that there had been a gift.

[19] Therefore the true applicable law for this case is the law of gifts, so that when the appellant's counsel says in paragraph 6 of his written submission that the nub of the appeal is the question whether the civil law or Islamic law is the applicable law, it is the law of gifts that should have been the concern of the question, not the law of banking or contract. The question would then be whether the applicable law in this case is the civil law of gifts inter vivos or the Islamic law of gifts inter vivos or *hibah*.

[20] As far as we can see, the only place in the appellant's outline submission where the appellant's counsel submits on that question is in subparagraph b of the aforesaid para 14.4. Because we have found the subparagraph is somewhat lacking in clarity, we have to quote it in full:

> 'b. The applicable Islamic law enactments are [*sic*] the Selangor Administration of Islamic Law Enactment 1989. The Enactment is silent as to the issues herein. The learned Judge relied on s 42(2)(b)(vi) which merely provides for jurisdiction. An analogous provision (Federal Territory Enactment) was declared by the Shariah Court of Appeal to fall within the power of the Civil High Court in the exercise of its Probate and Administration Jurisdiction (*Jumaaton dan satu lagi lwn Raja Hizaruddin* [1998] 6 MLJ 556 …). It would follow that the Civil Courts would apply civil principles. There is further no provision as regards monies in joint accounts of banks. There is further no provision for the operation of faraid over monies held in joint bank accounts. There are as such no applicable provisions.'

[21] From the references to moneys in joint accounts, we suspect that the paragraph is also thinking of the law of banking as it concerns joint accounts. The only indication that the subparagraph is speaking about the law of gifts inter vivos is the reference to the reliance by the judge on s 42(2)(b)(vi) of the 1989 Selangor Enactment, which assigns to the Syariah High Court the jurisdiction to hear and determine actions and proceedings relating to gifts inter vivos in which all the parties are Muslims, although we do not find the judge referring to that section, that is sub-para (vi) of s 42(2)(b), specifically in his judgment. The crux of the argument in the said subparagraph b seems to be that because, following or on the analogy of the Federal Territory Syariah Court of Appeal's decision in *Jumaaton*, the dispute in this case falls within the subject of probate and administration, in relation to which the Syariah courts have no jurisdiction, the dispute has to be decided by the civil court and the civil court must decide it according to civil law, as opposed to Islamic law, principles. In other words, the argument is that the civil court, in which the dispute has to be decided, has no capacity to decide it according to Islamic law. As to whether the argument in subparagraph b includes also the argument that the Islamic law of gifts inter vivos cannot be applied in this country unless and until it is codified in written law, subparagraph b does not expressly say. But in case the mentions or hints in the subparagraph of or as to the absence of statutory provisions are intended to refer not only to provisions of Islamic law about joint accounts but also provisions

of Islamic law about gifts inter vivos, let us say at once that we do not accept the proposition that Islamic law has no force or operation in this country unless it is contained in written law. The Syariah courts have jurisdiction in respect of a variety of civil matters that are specified in Item 1 of the State List. Not all of those matters have been codified in legislation. Even when there is legislation in respect of a matter, there are bound to be various aspects of the matter that are not covered by legislation. To require that Islamic law on a particular matter or point must be contained in a statute before it can be given effect to would hamper the Syariah courts in their ability to decide a dispute where it involves a matter or point of Islamic law that is not covered by legislation. The civil courts would similarly be hampered where a dispute that falls within their jurisdiction necessitates the determination of a point of Islamic law that is not covered by legislation.

[22] The crux of the argument in subparagraph b, the object of which is to justify the assertion that the civil law of gifts inter vivos has to apply in this case, proceeds from an assumption as to judicial jurisdiction in respect of the subject matter under which the dispute in this case may properly be classified. It classifies the subject matter, following *Jumaaton*, as a probate and administration matter, in respect of which the Syariah courts have no jurisdiction but the civil courts have. That the civil courts have to apply the civil law of gifts inter vivos is an argument that is a consequence of the assumption as to jurisdiction. It is therefore necessary to determine whether the assumption as to jurisdiction is correct. Is it true that the subject matter of the dispute in this case, namely the subject of gifts inter vivos, is a probate and administration matter, and therefore is not a matter in respect of which the Syariah courts have jurisdiction?

[23] The Ninth Schedule to the Federal Constitution comprises lists of legislative matters, that is, matters with respect to which Parliament and the State legislatures have power to make laws. By virtue of art 74, Parliament has power to make laws with respect to matters in the Federal List and a State legislature has power to make laws with respect to matters in the State List. Among the matters in Item 1 of the State List is 'the constitution, organization and procedure of Syariah courts'. That means that a State legislature has power to make laws with respect to the constitution, organization and procedure of Syariah courts. As it happens, the jurisdiction of the Syariah courts is also conferred — constitutionally and directly conferred — in Item 1 by the words 'which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph', meaning Item 1. It is a conferment of judicial jurisdiction according to legislative jurisdiction. Where there is legislative jurisdiction, judicial jurisdiction follows. Among the matters in Item 1 are 'Islamic law relating to succession, testate and intestate' and 'Islamic law relating to … gifts'. So far it should be obvious that the matter of succession and the matter of gifts according to Islamic law, where they involve Muslims, are matters within the judicial jurisdiction of the Syariah courts. We particularly mention succession in view of the *Jumaaton* case and we particularly mention gifts in view of the present case.

[24] The dispute in *Jumaaton* was over certain shares in the name of a son of the deceased which other beneficiaries claimed belonged to the deceased and therefore

formed part of his estate. The action had been brought in the Syariah High Court of the Federal Territory of Kuala Lumpur. A preliminary issue arose as to whether the dispute fell within the jurisdiction of the Syariah courts. It is not revealed in the judgment on what legal grounds the beneficiaries disputed the title of the son to the shares, but from the references at pp 561A and 563C of the report, it would appear that the dispute was viewed broadly as belonging to the legal subject matter of succession. Consistently with Item 1 of the State List, s 46(2)(b)(viii) of the Administration of Islamic Law (Federal Territories) Act 1993 provides that the Syariah High Court shall hear and determine all actions and proceedings in which all the parties are Muslims and which relate to 'division and inheritance of testate or intestate property'. The Syariah High Court, however, ruled that it did not have jurisdiction over the dispute. The Syariah Court of Appeal upheld the ruling. They took the view (at p 563C and G) that the matter of succession to or division and inheritance of the property of a deceased person involves probate and administration, which is not included in the matter of 'succession, testate and intestate' in Item 1 of the State List. Since probate and administration falls in the Federal List and not in the State List, it was held that the Syariah courts have no jurisdiction over the dispute.

[25] It is only too true that the matter of succession does not include probate and administration. They are different matters. And precisely because they are different matters, one ought not to be viewed as involving the other. The law of probate and administration is concerned with administrative matters as to the governance of estates of deceased persons, such as the obtaining of the authority to administer the estates and the powers and duties of persons who administer them. It is not concerned with the determination of rights of beneficiaries to the estate. That is the concern of the subject of succession, which includes the subjects of wills and distribution of estates. Look at the Federal List, where the position is set out in Item 4, paragraph (c), which has two subparagraphs. Subparagraph (i) includes, as separate and distinct matters, ' … property and its transfer and hypothecation, except land; … succession, testate and intestate; probate and administration … '. Subparagraph (ii) excludes from subparagraph (i) 'Islamic personal law relating to … gifts or succession, testate and intestate' because, according to Item 1 of the State List, gifts and succession under Islamic law belong to the jurisdiction of the State. Substantive rights to property, whether claimed through or derived from a transfer (including gift) or hypothecation (except where land is concerned) or through or from succession, testate or intestate, clearly are constitutionally treated as separate and distinct from the subject of probate and administration.

[26] We have already concluded that the applicable law for the dispute in this case is the law of gifts inter vivos. By relying on *Jumaaton*, counsel for the appellant has to be saying that the civil courts have the jurisdiction over the dispute, and not the Syariah courts, even though it involves Muslims, because it is a dispute about probate and administration, which is not within the jurisdiction of the Syariah courts. We cannot agree that a dispute about gifts is a dispute about probate and administration, just because it arises in the context of the administration of an estate. In the course of administering an estate, various problems may arise, such as, as in this case, whether a property belongs to the estate, the answer to which depends, as in

this case, on whether the property belongs to someone else as a valid gift, or whether a person is a beneficiary, the answer to which may depend on whether he is the issue of a valid marriage. Each of these problems has to be solved according to the particular law that is applicable to the nature of the problem. It may be the law of gifts, or the law of marriage, or even the land law. Merely by reason that the problem arises in the course or context of administering an estate, it does not become a problem of the law of probate and administration.

[27] It is, therefore, our finding that the subject matter of the dispute in this case, which is that of gifts inter vivos or *hibah* between Muslims, is not a probate and administration matter and is within the jurisdiction of the Syariah courts. Consistently with Item 1 of the State List, the Administration of Islamic Law (Selangor) Enactment 1989, in s 42(2)(b)(vi), the Administration of Islamic Law (Selangor) Enactment 2003, in s 61(3)(b)(vi), and the Administration of Islamic Law (Federal Territories) Act 1993, in s 46(2)(b)(vi), all include the matters of gifts inter vivos involving Muslims within the jurisdiction of the Syariah High Court.

[28] Having found that the dispute in this case concerns a matter that is within the jurisdiction of the Syariah courts, we are faced with the fact that cl (1A) of art 121 of the Federal Constitution declares that the civil High Courts shall have no jurisdiction in respect of the matter. This question has not been raised by any party in the appeal because both parties had agreed, so we were informed at the commencement of the hearing of the appeal, that the civil High Court had jurisdiction to hear and determine the dispute. From the written submissions of both parties it would appear that, following *Jumaaton*, they treated the dispute as one about probate and administration. During the hearing of the appeal itself, the possibility that the dispute might after all fall within the jurisdiction of the Syariah courts and the consequence of that in view of art 121(1A) did not cross our minds because our attention was fully occupied with the effort of following the submission. So there was no occasion to see what we are now seeing and to put it to counsel. But in any case cl (1A) cannot be ignored. If a matter is within the jurisdiction of the Syariah courts, the Constitution denies jurisdiction in respect of it to the civil High Courts and, in face of such express denial, jurisdiction cannot be conferred by the agreement or consent of the parties. The consequence is that the civil High Court had no jurisdiction over the dispute and the orders made were null and void and have to be set aside. Therefore, and considering that it does not result in an outcome favourable to the appellant, we dismiss this appeal and set aside the orders of the High Court. Since this consequence arises from the agreement of the parties themselves and amounts to that this appeal brings no victory to any party, we make no order as to costs and we order that the deposit be refunded to the appellant. The parties have to bring the dispute to the Syariah High Court. This a distressful decision to make, realizing the bitter disappointment that it must bring to the beneficiaries and the great amount of time, trouble and expense that have to be borne to have another round of trial in the Syariah High Court but it is an inevitable decision. We have to uphold cl (1A) as a matter of great constitutional importance.

[29] To provide against the eventuality that it be decided on appeal that we were wrong in holding that the civil High Court had no jurisdiction to hear and decide this dispute and in deciding on that ground that this appeal be dismissed, we proceed now to consider the appeal on its merits.

[30] First, as to the applicable law of gifts inter vivos, we are of opinion that, as the learned trial judge found, the applicable law is the Islamic law of *hibah*. Were this dispute to have been brought in the Syariah High Court, as it might well have been if the parties had recognized that the legal subject matter of the dispute was, instead of the law of probate and administration, the Islamic law relating to gifts, in respect of which, according to Item 1 of the State List, the Syariah courts have jurisdiction, the applicable law would of course have been the Islamic law of gifts. It is clearly unacceptable, and unsupported by any authority, that the civil High Court, hearing and deciding the same dispute, has to apply a different law, that is the civil law of gifts inter vivos. We say 'different law' to mean different in genesis and classification, not different in substance, because as it happens the Islamic law and the civil law of gifts inter vivos seem to share much in common. The civil courts have been applying Islamic law in disputes that have arisen before them. See, for example, *Tengku Haji Jaafar Ibni Almarhum Tengku Muda Ali & Anor v Government of Pahang* [1987] 2 MLJ 74, where the Supreme Court considered the Islamic law of gifts. We rather suspect that the proposition that the civil High Court cannot apply the Islamic law stems from a belief that the reason cl (1A) of art 121 denies the civil High Courts jurisdiction in respect of matters falling within the jurisdiction of the Syariah courts is because the civil High Courts are considered to be unequal to the task of adjudicating on matters of Islamic law. Even assuming that to be the reason, the fact remains that it only resulted in an enactment, that is cl (1A), to deny to the civil High Courts jurisdiction as to matters, and not in a prohibition against applying Islamic law in matters properly before them where it is appropriate or necessary to do so.

[31] As to what are the conditions for the validity of a *hibah*, both parties are agreed that there are three, namely, (1) a manifestation of the wish of the donor, (2) the acceptance of the donee, either impliedly or expressly, and (3) the taking possession of the subject matter of the gift by the donee, either actually or constructively. See *Tengku Haji Jaafar* (*supra*), at p 79A (left).

[32] The learned judge did not state his findings of fact as to any of these three conditions although he was aware of them. He did not set out or analyse the evidence. His essential finding, which we have referred to and which was made without setting out the evidence and indicating how he weighed the evidence, was simply as follows at p 10 of his judgment:

> 'Dalam kes ini wang di dalam kedua-dua akaun adalah akaun bersama. Dari bukti penggunaan cek itu adalah jelas bahawa kedua-dua arwah dan Latifah bebas menggunakan akaun itu. Malahan ada bukti mengatakan pembayaran melalui akaun bersama itu adalah untuk kepentingan bersama arwah dan Latifah. Ia berlainan jika kedua-dua akaun itu cuma boleh ditandatangani Latifah. Dengan lain-lain perkataan dari segi Islam Latifah tidak miliki wang yang ada dalam akaun bank bersama itu kerana ia tidak memilikinya secara eksklusif.'

It was a finding that the appellant did not own the moneys in the joint accounts because she did not have exclusive ownership (or possession) of them. That may be seen as a finding as to the third of the conditions.

[33] At the hearing of this appeal we had before us two sets of written submissions. One is the appellant's outline of submission, which we have referred to. The other is

A entitled 'Respondents' Outline Submission'. The appellant's outline submission is dated 8 August 2005. The respondents' outline submission is dated earlier, 3 August 2005, which means that it was not prepared with knowledge of the contents of the appellant's outline submission and as a reply to it. Yet para 67 of the respondents' outline submission states the following in conclusion:

B

> We submit that it would be [*sic*] not be proper for this honourable court to interfere with the decision of the trial judge as the Appellant has failed to show that the learned trial judge has been plainly wrong in arriving at his decision. Nor has the appellant shown that that [*sic*] there has been insufficient judicial appreciation of the evidence on the part of the learned judge. Under the circumstances, we pray that this Appeal be dismissed with costs.

C It assumes or anticipates that the appellant's outline submission would fail to show that the learned trial judge erred in his decision or that there had been insufficient judicial appreciation of the evidence. As a matter of fact, it is obvious from the judgment itself, without it having to be shown, that there is no demonstration of judicial appreciation of the evidence.

D

[34] The appellant's outline submission has an annexure of the salient facts of this case, in which, in Part D, is set out in detail, with the necessary references, the evidence that the appellant relies on for proof of the three requirements of intention, acceptance and possession. In Part E is set out, in detail and with the necessary E references, the evidence for the respondents, along with an evaluation of the relevant aspects of the evidence. Although the evidence in the annexure is presented to show that the requirements of the civil law of gifts inter vivos had been satisfied (the appellant contending that the civil law should apply) it is also intended for proving that the requirements of *hibah* had been satisfied, should it be decided that Islamic law applies.

F

[35] Our approach to this appeal is not to undertake an independent study of the entire evidence and make findings of fact of our own and decide whether the appellant had discharged the burden of proving *hibah*, as if we were hearing the case at first instance, but to see what are the points raised by the respondents' counsel, G who must be conversant with the evidence, to show that there had been no proof, and determine whether there is any validity in any of the points, on the premise that there would be nothing in the respondents' favour in anything that their counsel does not raise.

H **[36]** As we said, the respondents' outline submission is not a reply to the appellant's outline submission. Because of time constraint, the respondents' counsel was not able to reply to the appellant's outline submission during the hearing of the appeal. We, however, allowed him to put in a post-hearing reply, which he did after the hearing. The reply, dated 29 August 2005, is entitled 'The Respondent's Continued Submission'.

I

[37] We turn first to the Respondents' Outline Submission. Several points are raised in paras 28 to 35 to support the concluding submission in paragraph 36 that the appellant has failed to prove 'clearly and convincingly' the requirement of intention.

[38] Paragraphs 28 to 31 deal with the first point. We shall reserve this point and deal with it towards the end of the judgment because it is somewhat messy. A

[39] The second point is dealt with in para 32. The point is in this question at the end of the paragraph: 'How could the moneys belong to the appellant if such moneys were used to pay for the needs of both households?'. The point is that since the moneys in the joint accounts were used to pay for the needs of both households, meaning, we presume, the households of the appellant and of the deceased Pn Buruk, they could not have belonged to the appellant. For proof that the moneys were used to pay for the needs of both households, para 32 points to the following evidence. In cross-examination (notes p 17) the appellant agreed that all cheques signed by her, amounting to RM819,023.35, and by the deceased, amounting to RM2,959,500.79, were for '*urusan rumahtangga*', meaning domestic or household affairs. In para 28 of her affidavit dated 25 April 2001, the appellant had said that one of the reasons why the deceased gave the moneys in the joint accounts for the interests of herself and her children was that he no longer wished to concern himself with '*perkara rumahtangga*' (domestic or household matters). In cross-examination about this reason (notes p 22), she agreed that the cheques that were signed were '*sangkut dengan hal rumah tangga*' (connected with domestic or household affairs). When it was put to her that it was not true that the deceased no longer wished to concern himself with household matters, she, after a delay, denied it. We think that there is no merit in the second point because there is nothing in the appellant's evidence that is pointed to in para 32 of the respondents' outline submission that says that the moneys withdrawn from the joint accounts were for *both* households. Furthermore, the point of the appellant's cross-examination that para 32 points to was not the point in the paragraph but what was put to the appellant, namely, that it was not true that the deceased no longer wished to concern himself with household affairs. B C D E F

[40] The third point is dealt with in para 33 of the respondents' outline submission. It concerns a donation of RM1.4m (by seven cheques signed by the deceased) from the SCB joint accounts for the construction of a mosque in Cheras. To maintain that despite such use of the SCB joint accounts by the deceased the moneys in the accounts had been gifted to her and belonged to her, the appellant had testified that the donation had been with her consent. The point in para 33 is the argument that the appellant's claim of consent cannot be true, and the argument relies on the contention that Rosnita, one of the deceased's daughters by Pn Buruk, 'states that the deceased had already spoken of his intention to make the donation'. We do not find that there is anything in the argument at all. In the first place, the thrust of the argument seems to be that *before* actually making the donation the deceased had informed Rosnita of his intention to do so, but even if that were true, it does not mean that the donation could not have been with the consent of the appellant. The appellant could have already given her consent when the deceased spoke about the intended donation to Rosnita, or the deceased could have assumed, when he spoke to Rosnita, that the appellant would consent, and she did in fact subsequently consent. In the second place, the contention that the deceased had already spoken of his intention to Rosnita relies on Rosnita's evidence in paragraph 8 of her affidavit dated 8 May 2001. But in that paragraph Rosnita mentioned the donation for the mosque only incidentally and there is nothing in that paragraph that G H I

suggests that the deceased spoke at all to Rosnita of his intention or did so before he made the donation. In that paragraph, Rosnita was speaking about the sum of RM100,000 each that she, the two respondents and Rosilawati finally, after much delay, received in November 1999, which she, Rosnita, claimed was part of a sum of RM200,000 that the deceased was said to have promised Pn Buruk to give to each of her five children and to Zation, Pn Ramlah's daughter. It was in stating the reason for that delay that Rosnita mentioned the donation for the mosque. Her actual words in that respect in paragraph 8 were, as we translate them: 'I was informed that the said sum was delivered late owing to waiting for the completion of the construction of the mosque at Batu 10, Jalan Cheras which was built as a result of a donation from the deceased'.

[41] The fourth point is dealt with in paras 34 and 35 of the respondent's outline submission and is about the payment of RM100,000 each to Rosnita, the two respondents and Rosilawati, totalling RM400,000, that we have just mentioned. Paragraph 35 says that the appellant claimed to have advised the deceased to make those gifts, but does not state the place in the evidence where the alleged claim was made. However, we note that in para 21.6.1 of her affidavit dated 25 April 2001 the appellant had said that in November 1997 the first respondent, worried that she might not receive any property should the deceased pass away, had sought from her money gifts for herself, the second respondent and Rosnita, and the appellant had made, or agreed to, a payment of RM100,000 to each of them. We assume that that is the appellant's claim intended by para 35. The fourth point, stated in that paragraph, is that 'this statement is not credible at all' and the reason given in para 35 for that contention is that, according to para 9 of Rosnita's affidavit dated 8 May 2001, that we have referred to in connection with the third point, what was paid was part of the RM200,000 that the deceased had promised Pn Buruk to pay to each of his children. Paragraph 9 of Rosnita's said affidavit was in reply to the appellant's contention in para 21.6.1 of her said affidavit. Rosnita, in her paragraph 9, concluded, as witness the words '*Oleh itu*' (therefore), that the appellant's claim in para 21.6.1 that it was she who advised the deceased to give the money was not true. Rosnita's para 9 being a statement of conclusion, it is necessary to look at the earlier paragraphs of her affidavit for the reason for the conclusion, and the intended reason appears to be in para 5. In that paragraph, Rosnita related an incident during breakfast when, in the presence of the deceased, Pn Buruk told Rosnita that she had asked the deceased to give to all his children RM200,000 each or a house in lieu. According to Rosnita, the deceased had answered, in Negeri Sembilan dialect, '*Tahulah seh (saya)*'. Literally, it means 'I know' with the emphasis '*lah*', but it is impossible to judge what it really means without hearing the tone in which it was said. There is no evidence that it meant a promise, as paragraph 35 of the Respondents' Outline Submission says it was, and we are not prepared to hold that it was a promise. Even if it was a promise, that does not render the appellant's claim 'not credible at all'. The promise would have been made before Pn Buruk died on 17 March 1998. Since by November 1999, the promise had not been fulfilled, it is nothing surprising if, as the appellant claimed, the first respondent approached her for money. In para 21.3 of her said affidavit, the appellant had said that the first respondent had often approached her for financial assistance, either directly from her or by asking her to convey her request to the deceased.

[42] There is another thing which we ought to mention about the fourth point, which, for the reasons that we have given, we find to be without merit. In the evidence about the fourth point that is pointed to by paras 34 and 35 of the respondent's outline submission, there is no indication whether the RM400,000 came from any of the joint accounts, but we notice that the appellant, when she was cross-examined, said (notes p 9) that the sum came from the deceased, which we take to mean from his own money and not from the joint accounts. If that was so, then the relevance of the fourth point is only to the general credibility of the appellant and not to the question of the use of the joint accounts as a matter relevant to the question of the intention behind the joint accounts.

[43] Those are the four points relied on in the respondent's outline submission for contending that the appellant had failed to prove the requirement of intention. As we said, we shall deal with the first point towards the end of this judgment. The other three points have no merit.

[44] As to acceptance, para 36 of the respondent's outline submission merely says, without the support of any argument, 'Nor has the appellant shown that there was acceptance by her either impliedly or expressly'. As to the requirement of taking of possession, para 38 merely says that 'based on the evidence of the various witnesses and documents tendered in evidence, the Appellant has failed to prove that the ownership of the moneys had passed to her', but does not demonstrate or argue how the evidence falls short of proving that.

[45] We turn now to the respondents' continued submission. That is the submission by which for the first time the respondents had the opportunity to reply to the Appellant's Outline Submission, in which, as we said, the appellant contends, on the strength of the evidence set out in the annexure, that the three requirements for a valid *hibah*, namely intention, acceptance and possession, had been fulfilled. The respondents' continued submission deals only with the question of intention, and that is in Part D, entitled 'Which Side's Witnesses are to be Believed on the Balance of Probability' and comprising paras 34 to 43. Paragraph 34 adverts to the appellant's counsel's resort to the Annexure to the appellant's outline submission for proof of intention and para 43 concludes by contending that the appellant had failed to prove intention 'clearly and convincingly'. Judging by the submission in the respondents' Part D in face of the appellant's outline submission, it is clear to us that it is the question of intention that is the real dispute of the respondents in this appeal. The purpose of the submission in Part D, judging by its title and the submission in para 34, is to show that, in relation to two issues, the appellant is not to be believed, and therefore she is not to be believed on her evidence (which we shall set out later) as to the deceased's expressed intention.

[46] In paras 41 and 58 of her affidavit dated 30 April 2001, the appellant said that after the conversion of the joint accounts — *pemindahan* was her word — which was on 29 March 1998 and 9 April 1998, the deceased had given her all deposit books and cheques books, and she had used the accounts as her personal accounts. In cross-examination, when it was put to her that at least until July or August 1999, that is for at least a year after the conversion or opening of the joint accounts,

A the cheque books were in the deceased's custody, the appellant disagreed. One of the two issues dealt with in Part D of the respondents' continued submission is the custody of the cheque books. It is dealt with in paras 35 to 37. In para 37, it is submitted in effect that on the evidence the appellant did not have custody of the cheque books and that therefore the moneys in the joint accounts could not have B been hers.

[47] The evidence relied on in Part D of the respondents' continued submission for this issue is that of Muhamat bin Mohd Yusoff, the deceased's driver and a witness for the respondents (SD4), and that of another witness. In paragraphs 6 and 7 of his C affidavit dated 9 May 2001 Muhamat said that until the end of July 1999 the cheque books were kept in the deceased's briefcase which he carried with him wherever he went, but '*Selepas dari itu*' (after that) they were kept by the appellant until the deceased died, which was on 2 January 2000. In cross-examination he qualified or clarified his evidence by maintaining that the appellant got custody of the cheque D books in August 1999, after a visit to Sungai Long which, according to him, took place at about the beginning of August 1999. The other witness is Nor Hashim bin Abd Kadir, a business associate of the deceased's and a witness for the appellant (SP4). This witness said in examination-in-chief that the cheque books were kept in the deceased's briefcase which he carried with him wherever he went and that the E briefcase was kept in his car until he died. But this witness, who said that he used to write out the deceased's cheques, also said that he stopped doing so at least a year before the deceased died, which might mean that in January 1999, if not earlier, the cheque books were in the appellant's custody.

F **[48]** From the manner in which the submission on this issue is cast in paras 35 to 37, it would appear that the intention is to show that on the evidence of Muhamat and Nor Hashim the appellant did not ever have custody of the cheque books. This may be seen particularly in the fact that the evidence that is pointed to in paras 35 and 36 in Part D in support of the submission ignores the evidence, G particularly that of Muhamat, that the appellant did have custody of the cheque books at least from August 1999. Since the submission on this issue is on the basis that the appellant did not ever have custody of the cheque books, we have to reject it.

H **[49]** The other issue is dealt with in paras 38 to 41 in Part D and arises from a visit to Sungai Long, that has been mentioned earlier in passing, where a bungalow for the appellant was being constructed. The evidence about this visit is mostly in paras 9 to 14 of Muhamat's same affidavit dated 9 May 2001. Briefly the evidence is that in early August 1999 the appellant and the deceased went separately to the place to look at the bungalow. At the end of the visit, the appellant asked the deceased to sign five I or six blank cheques to pay for modifications to the bungalow. The deceased was reluctant to sign the cheques, saying that the house did not need modification. When he asked what was the total amount that was required, the appellant refused to state the amount. On the appellant's insistence, the deceased finally signed the cheques in blank with great reluctance and in anger.

[50] It is important to quote the actual argument of the respondents' counsel on this issue:

> 39. The appellant had denied giving the cheques to the Deceased in the car to sign. There was no necessity for the appellant to press her husband to sign the blank cheques if the monies were indeed hers, more so when — according to Muhamat — the deceased appeared angry with her …
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> 40. The appellant under cross-examination denies this but this denial cannot be credible as she had given evidence that she had asked the deceased to sign blank cheques before.

The argument may be broken down into four steps: (1) the evidence is that the appellant brought blank cheques and *gave* them to the deceased and asked him to sign them; (2) the appellant denied this in cross-examination; (3) the denial cannot be credible; (4) it cannot be credible because the appellant herself had given evidence that she had asked the deceased to sign blank cheques before.

[51] Step (1) is incorrect. We do not find either in Muhamat's affidavit and cross-examination or in the appellant's cross-examination any indication that the appellant brought blank cheques for the deceased to sign. Reading paras 11 to 14 of Muhamat's said affidavit closely and literally as they are worded, what Muhamat said in those paragraphs simply means that the appellant asked the deceased to let her have several blank cheques signed by him. Step (2) is incorrect. It was put to the appellant in cross-examination (notes, pp 23 and 24) that she asked the deceased to sign several blank cheques, and this she denied. But it was not put to her that they were cheques that she brought and asked the deceased to sign. So there was no question of her denying that. Step (3) therefore does not arise. Even if step (3) arises, step (4) is incorrect. The appellant's evidence relied on for saying that the denial cannot be credible is an answer that she gave in cross-examination (notes p 22). As we have mentioned in connection with the first issue, it was put to her that the cheque books had been in the deceased's custody at least until July or August 1999. She disagreed. To go by the notes, she immediately followed that up with the statement: '*Saya ada pernah diberi cek kosong yang telah ditandatangan arwah.*' It means that there had been an occasion or occasions when the deceased had given her blank cheques that he had signed. There is no evidence as to why the deceased gave her those cheques or what the cheques were for. Step (4) is incorrect in inferring that it was the appellant who had asked the deceased to sign the blank cheques on those occasions. It need not necessarily have been so. There is no evidence of the circumstances. Therefore we have to reject the argument as to the second issue.

[52] We now revert to paras 28 to 31 of the Respondents' Outline Submission which we have left to be dealt with last. Paragraphs 28 to 31 focus on the following evidence. In her affidavit dated 25 April 2001, the appellant in paras 38 to 40 and 54 to 57 gave an account of how the joint accounts came about. The evidence was essentially the same for both the BCB joint account and the SCB joint accounts. It is necessary, for the moment, to relate only what she said in paras 38 to 40 about the SCB joint accounts. She said that the deceased had wished the accounts to be in her sole name and she had accepted his gift, but she wanted the accounts to be in her name and that of the deceased because she did not wish to be thought greedy and also because it was not necessary for the accounts to be in her sole name since all the

A moneys were for the interest of '*kami sekeluarga*', meaning, we presume, herself, the deceased and their two children. The deceased, she said, had agreed to her wish although his *niat* (intention) was to gift to her whatever moneys that might be put into the accounts. Then in para 40 she said, as we translate it:

B > This intention (*niat*) was intimated to the bank officer who carried out the conversion of the accounts. The deceased stressed to the officer that I must be recognized as the owner of the accounts and whatever instructions or cheques that I issued must be respected without any reference to the deceased.

C **[53]** Paragraphs 29 and 30 of the Respondents' Outline Submission then point to what the BCB bank officer, who was the appellant's witness (SP3), said. In his witness statement (answer 8), he said that the deceased wished to open a joint account with the appellant with the condition that either one could operate the account and that the appellant had stressed that if anything undesirable should happen to him, the appellant must have the right to withdraw the money in the account. In his D examination-in-chief (notes p 227), the witness added, as we translate it: 'If the deceased could not be present, [the appellant] could withdraw. It is only a general statement'. In cross-examination (notes p 227), he said that he had not been taught what would happen if one joint-account holder dies.

E **[54]** The point that is sought to be made by referring to those bits of evidence is stated in these words in para 30 of the respondents' outline submission: 'Thus [the bank officer] had merely opened a joint account for the deceased and the appellant under normal banking practice but had not shown that the deceased had created a *hibah* of the monies in the account in favour of the appellant'. It seems to us that the F point is that the appellant's statement that the deceased intimated his *niat* of *hibah* to the bank officer was not true because the bank officer did not corroborate the statement, and therefore the appellant's story about the deceased agreeing to her wish that the account be in their joint names while really intending that the money in it be hers, which must have taken place before the deceased went with the appellant to the bank to open the BCB joint account, cannot be true.

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[55] It seems to us probable that when the appellant said in the first sentence of para 40 of her affidavit that the deceased intimated to the bank officer his intention to gift to her whatever moneys that might be put into the joint account, she did not mean to say that the deceased actually told the bank officer, 'Whatever moneys that H may be paid into the account I gift to her'. It seems to us probable that what she actually meant to say the deceased said was explained in the second sentence of the paragraph, and that she was merely construing that as amounting to intimating to the bank officer the deceased's *niat* to gift to her all moneys paid into the account. What, according to the second sentence, the deceased said to the bank officer was substantially corroborated by the BCB bank officer.

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[56] Paragraph 31 of the respondents' outline submission picks out the following evidence of the SCB bank officer, also a witness for the appellant (SP2), to compare with the appellant's statement in the said para 40 of her affidavit. In her witness statement, in answer to the question, question 22, whether the meaning and

consequences of the survivorship mandate were explained to the deceased and the appellant when the joint accounts were converted from those with Pn Buruk to those with the appellant, the bank officer replied: 'No. As the deceased had held joint accounts before we made it known to him that the same terms would apply. He accepted that explanation and did not make any further enquiries'. In cross-examination, the witness said: 'We are trained to advise on joint Muslim accounts. For Muslim customers Syariah laws supersede others. I said this to [the deceased]. I don't think [the appellant] heard what I said.' The intention of the respondents' counsel in referring to those bits of evidence is really to say that throughout the evidence of the SCB bank officer, she 'made no mention of a *hibah* being created by the deceased in favour of the appellant'. As it is in relation to the evidence of the BCB bank officer, it seems to us that counsel's point here is also that the evidence of the SCB officer shows that what the appellant said in para 40 of her affidavit was not true.

[57] While the appellant's evidence as to what the deceased informed the BCB officer is defensible for the reasons that we have stated, her evidence that the deceased told the same thing to the SCB officer is clearly unsupported by the evidence of the SCB officer. But we are not prepared to hold that she had intentionally lied in her affidavit as regards the SCB officer. For one thing, we do not find that she had been confronted with the evidence of the bank officer and given an opportunity to explain why her averment was not supported by the evidence of the SCB officer. For another, if the deceased in fact, and to the appellant's knowledge, did not say what the appellant said he did say, we do not think it likely that she would say it, knowing, as we assume she did, that the SCB officer would be called to give evidence as her witness. We suspect there may be something wrong here in the preparation of the affidavit in which the appellant was trapped. Let us attempt to explain what we mean, although the situation is somewhat complicated.

[58] In the affidavit concerned, the conversion of the SCB joint accounts is dealt with first in paras 38 to 40, although in reality that happened after the opening of the BCB joint account. Paragraph 38 speaks of the deceased's intention and the appellant's reason for wanting the accounts to remain as joint accounts. Paragraph 39 speaks of the deceased's agreeing to the appellant's wish despite his *niat*. Paragraph 40 speaks of the deceased's intimation of his *niat* to the bank officer. Later, in paras 54 to 57, comes the narrative of the opening of the BCB joint account, which happened earlier than the conversion of the SCB joint accounts, but the narrative is given as if it happened after the conversion of the SCB joint accounts. Paragraphs 54 and 55 mirror, not identically but in import and partly by adoption, paragraph 38, with para 55 saying that once again (*sekali lagi*) the deceased wished to convert the account to her name. Paragraph 56 mirrors para 39 in import, but speaks of the deceased's agreeing to the appellant's wish as occurring once again (*sekali lagi*). Paragraph 57 mirrors in import paragraph 40 and speaks of what the deceased informed the bank officer as his *niat*, but by way of adoption of what was said in paragraph 40, that is, in these words, as we translate them: 'The same statement as was stated by the deceased to the SCB officer was made to the BCB officer'. The picture is conveyed that the deceased said those things first to the SCB officer and later repeated them to the BCB officer. As a matter of sequence, that is an untruth. As a matter of realism,

it is unrealistically too neat that the same things were said to two different bank officers at different times. As to the words '*sekali lagi*' in paras 55 and 56, they convey the impression that the same discussion between the appellant and the deceased about the intention of the deceased and the wish of the appellant took place on two different occasions, once in respect of the SCB joint accounts and once in respect of the BCB joint account. That strikes us as unrealistic. It is not incredible, but we should think that it would be in greater consonance with reality if the discussion had taken place only once in respect of the accounts in the two banks together and that that was what was more likely to have happened.

[59] There is another thing that we need to mention about paras 54 to 57. Read with para 53, they speak of the BCB joint account as, like the SCB joint accounts, a joint account originally in the names of the deceased and Pn Buruk but converted to the names of the deceased and the appellant. That is not true. The evidence of the BCB bank officer is that the deceased and Pn Buruk had a joint account, but the joint account of the deceased and the appellant was a new, different joint account and not one converted from the joint account of the deceased and Pn Buruk.

[60] There are therefore obvious untruths in paras 53 to 57 as there is an unrealistic feature. As far as sequence is concerned, the untruth infects paragraphs 38 to 40 as well in that, read with paras 54 to 57, they convey the picture that the SCB joint accounts came about before the BCB joint account. Now the untruths and the unrealistic feature in those paragraphs are, we dare say, due to the manner the appellant's account of matters and other facts are set down in the affidavit, and the manner of composing the affidavit, on the part of her solicitors, over which the appellant could not have had any control. A convenient approach seems to have been adopted of duplicating, for one bank, events in respect of the other bank, and in reverse sequence too. One result of this is that the appellant was trapped into relating, as an event that first happened, the deceased's words to the SCB officer, which account was not corroborated by the officer, and relating, as a subsequent event and by way of reference to or adoption of what had been related, the deceased's words to the BCB officer, which account, as we said, viewed as a perception of the appellant's, was corroborated by the BCB officer. If the narrative had been put the other way about, as it should have been, then the appellant's account of what the deceased told the SCB officer will be seen in its proper perspective as a duplication of her account of what the deceased had told the BCB officer earlier, a duplication that might have been a convenient approach in preparing the affidavit and that might not necessarily reflect what actually happened. To put it barely, the appellant, from hearing the deceased's words to the BCB officer, perceived them as the stating of his *niat*. She then assumed, or her solicitors assumed, that what occurred with the BCB officer also occurred with the SCB officer, and the account was duplicated, although in reverse order.

[61] Considering all that we have said about those two sets of paragraphs, we are unable to banish from our minds the thought that what we have said just now was what might well have happened and that the fact that the appellant's evidence about what the deceased told the SCB officer is not corroborated by the SCB officer as what

she said the deceased told the BCB is corroborated in the way that we said, was due to a mistake and does not signify a lie on the appellant's part. We are unable to conclude from that fact that she was an untruthful witness whose evidence about the deceased's intention as expressed to her was untrue.

[62] We have now finished dealing with all the points raised by the respondents' counsel in submission to show, against the appellant's contention, that there was no proof of the required intention on the part of the deceased, with the result that we do not find that any of those points prevails. Since the absence of intention is virtually the respondents' only quarrel in this appeal as regards the joint accounts, we would hold that *hibah* had been proved in respect of the joint accounts and that therefore the moneys in the joint accounts were the property of the appellant.

[63] As regards the money in the HEF account, the submission is scanty. The respondents' only submission, in paragraph 49 of the Respondents' Outline Submission, is that since the HEF form was not signed by the deceased 'this did not come into effect at all'. It is not apparent from the paragraph what 'this' refers to but we assume that it refers to *hibah* as not coming into effect. We are of the view that since there is clear evidence of the SCB officer that the deceased insisted that the appellant be the beneficiary and since the account was in fact opened, it does not matter that the form was not signed. We would therefore hold that the money in the HEF account was also the property of the appellant.

[64] To conclude, were it not for the impediment of jurisdiction, for the reasons that we have given we would allow the appeal and set aside the orders of the learned judge and order that the moneys in the joint accounts and the HEF account be paid to the appellant. But because of the impediment of jurisdiction, our decision is, as we said, that the appeal be dismissed and the orders of the High Court set aside but with no order as to costs, and that the deposit be refunded to the appellant. Moneys that have come into the hands of the administrators pursuant to the order of the High Court shall remain to be managed by them until the resolution of the dispute either on appeal or by the Syariah High Court.

[65] A member of the panel which heard this appeal, Mohd Noor Abdullah JCA, went on retirement on 29 April 2006, but has not indicated his decision on this appeal. This judgment is therefore a majority judgment that is in accordance with s 42 of the Courts of Judicature Act 1964.

Appeal dismissed.

Reported by Peter Ling